BEFORE THE HEARING EXAMINER
FOR THE CITY OF OLYMPIA

In re: Eastbay Flats and Townhomes (Westman Mill) Appeal of Determination of Non-Significance and Land Use Appeal	No. 17-2795 APPLICANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

COMES NOW the Applicant, 3rd Gen Investment Group, LLC ("Applicant" or "3rd Gen"), by and through its attorneys Joseph A. Rehberger and Cascadia Law Group PLLC, and moves for an Order dismissing Appellant Olympia Urban Waters League's ("Appellant" or "OUWL") appeal. As explained below, OUWL's Notice of Appeal should be dismissed as a matter of law based on lack of standing and its failure to state a claim upon which relief can be granted. In the alternative, 3rd Gen moves for summary judgment. 3rd Gen brings this motion pursuant to CR 12(b)(6), CR 56, and the Pre-Hearing Order entered March 29, 2018 in this matter.

I. STATEMENT OF FACTS

On February 15, 2018, the City of Olympia ("City") approved 3rd Gen's application to construct a mixed-use development at the corner of State Avenue and Jefferson Street in downtown Olympia, sometimes referred to as the Eastbay Flats and Townhomes Development (Westman Mill). The proposed project consists of three buildings containing 86 residential units and approximately 8,500 square feet of commercial space on a parcel of property owned by the

CASCADIA LAW GROUP PLLC
606 COLUMBIA ST. NW, SUITE 212
OLYMPIA, WA 98501
(360) 786-5057

Port of Olympia.[1] Much, if not the entirety, of OUWL's appeal focuses on a culverted segment of Moxlie Creek which lies approximately 15 feet underground and underneath the City right-of-way at Chestnut Street, and is approximately 250 feet from the subject proposed development. *E.g.*, OUWL's Appeal Brief at 5, lines 8-11. The proposed development and lot on which it resides do not adjoin or abut Chestnut Street.

In conjunction with the land use approval, the City also issued a Determination of Nonsignificance ("DNS") under the State Environmental Policy Act ("SEPA") with respect to the project. In so doing, the City determined that the project will **not** have a significant adverse effect on the environment."[2] OUWL challenges both the land use approval and the DNS.

II. ISSUES

1. Whether OUWL lacks standing under SEPA to challenge the DNS?

2. Whether OUWL is precluded from appealing the DNS based on its failure to comment on the DNS during the applicable comment period.

3. If OUWL has or can establish standing, is 3rd Gen nevertheless entitled to summary judgment as to OUWL's SEPA claims?

4. Whether 3rd Gen is entitled to summary judgment as to OUWL's claims arising under the City's Critical Areas Ordinance and buffering requirements?

III. RELIEF REQUESTED

Applicant 3rd Gen requests the Examiner find that Appellant OUWL lacks standing under SEPA. In the alternative, 3rd Gen requests the Examiner enter summary judgment in its favor on OUWL's SEPA claims. Finally, 3rd Gen requests the Examiner enter summary judgment in its favor on OUWL's SEPA claims.

---

[1] *See* Notice of Appeal (attached Notice of Land Use Approval and State Environmental Policy Act Determination of Nonsignificance at 1 (SEPA DNS)). The Examiner granted the Port of Olympia Motion to Intervene by order dated March 21, 2018.

[2] *Id.* For the Examiner's convenience the land use approval and DNS is further provided as an attachment to the declaration filed herewith. *See* Declaration of Joseph A. Rehberger ("Rehberger Decl.") at Exhibit B.

CASCADIA LAW GROUP PLLC
606 COLUMBIA ST. NW, SUITE 212
OLYMPIA, WA 98501
(360) 786-5057

IV. AUTHORITY

3rd Gen moves the Examiner for dismissal, or in the alternative summary judgment as to all of OUWL's appeal claims. In considering motions pursuant to CR 12(b)(6), although well-pled factual assertions are regarded as true, *Lawson v. State*, 107 Wn.2d 444, 448, (1986), "[w]here it is clear from the [pleading] that the allegations set forth do not support a claim, dismissal is proper." *Berge v. Gorton*, 88 Wn.2d 756, 759 (1977).[3] In the alternative, 3rd Gen additionally moves the Examiner for entry of summary judgment in its favor. Summary judgment under CR 56 is appropriate "'if the pleadings, affidavits, depositions and admissions on file demonstrate that there is no genuine issue as to any material fact and the party bringing the motion is entitled to judgment as a matter of law.'" *Sheehan v. Central Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 797 (2005) (citation omitted); *see also* CR 56(c). Once the moving party demonstrates entitlement to summary judgment, the opposing party must go beyond the pleadings and designate specific facts to show that there is a genuine issue for trial. *White v. State*, 131 Wn.2d 1, 9 (1997). The opposing party may not rely on speculation or argumentative assertions that unresolved factual issues remain. *White*, 131 Wn.2d at 9. If the opposing party's evidence is merely colorable or is not significantly probative, summary judgment should be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). Moreover, if the nonmovant "'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that that party will bear the burden of proof at trial,' then the court should grant the motion." *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 (1986) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317. 322 (1986)).

A. OUWL Lacks Standing Under SEPA

To establish standing to challenge an action under SEPA, a party must (1) show that the alleged endangered interests fall within the zone of interests protected by SEPA and (2) allege an injury in fact, which requires evidence of specific and perceptible harm. *See Kucera v. Dep't of*

[3] If the Examiner considers matters outside the pleading (here OUWL's Notice of Appeal and Appeal Brief), the motion shall be treated as one for summary judgment and disposed of as provided in CR 56. CR 12(b).

CASCADIA LAW GROUP PLLC
606 COLUMBIA ST. NW, SUITE 212
OLYMPIA, WA 98501
(360) 786-5057

Transp., 140 Wn.2d 200, 212 (2000). To establish standing, an appellant must meet both standing prongs. The party challenging an administrative decision bears the burden of establishing his or her standing to contest the decision. *Patterson v. Segale*, 171 Wn. App. 251, 259 (2012).

OUWL has not alleged, and cannot establish, any "injury in fact" necessary to confer standing. First, in order to establish "injury in fact," an appellant must present "sufficient evidentiary facts" to establish that it "will be 'specifically and perceptibly harmed' by the proposed action." *Trepanier v. Everett*, 64 Wn. App. 380, 382-83 (1992). OUWL does not allege that 3rd Gen's project itself is likely to have a probable significant adverse environmental impact. WAC 197-11-330(1)(b). Relevant to this consideration, courts examine "'the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area.'" *Norway Hill Pres. & Prot. Assn. v. King County Council*, 87 Wn.2d 267, 277 (1976) (quoting *Narrowsview Preservation Ass'n v. Tacoma*, 84 Wn.2d 416, 423 (1974)). Second, where an appellant "alleges a threatened injury rather than an existing injury, [it] must also show that the injury will be 'immediate, concrete and specific'; a conjectural or hypothetical injury will not confer standing." *Leavitt v. Jefferson County*, 74 Wn. App. 688, 670 (1994) (quoting *Trepanier v. Everett*, 64 Wn. App. 380, 383 (1992)). OUWL's challenge fails as to both of these elements.

1. OUWL will not be "specifically and perceptibly harmed" by the development of 3rd Gen's Project.

First, OUWL has not established that it will be "specifically and perceptibly harmed" because of 3rd Gen's proposed project. OUWL establishes no facts showing the project will cause any environmental harm. Rather OUWL merely argues that the project "will *probably* permanently alter available options" for remediating East Bay and Moxlie and Indian Creek. OUWL's Appeal Brief at 24, lines 8-9 (emphasis added). OUWL alleges here that 3rd Gen's proposed project, located 250' away from a culverted stream segment, which traverses south from Interstate 5 through downtown Olympia, somehow will allegedly "*limit* the restoration options for

CASCADIA LAW GROUP PLLC
606 COLUMBIA ST. NW, SUITE 212
OLYMPIA, WA 98501
(360) 786-5057

Moxlie Creek and East Bay." *Id.* at 2, lines 1-3 (emphasis added). OUWL's entire appeal is based on alleged harms already caused by other existing uses in the area (i.e., the culverted stream segment, alleged existing water quality conditions, and the developed nature of downtown Olympia). OUWL goes to great lengths to discuss and purport to establish "significant existing water quality impairments,"[4] however those alleged impairments have no relation to 3rd Gen's project. SEPA does not require applicants to redress pre-existing environmental deficiencies.

2. OUWL'S alleged injuries are speculative and hypothetical in nature.

Second, OUWL's alleged injuries are all speculative in nature. Washington courts have declined to confer standing in similar situations. For example, in *West v. Port of Olympia*, appellants challenged the Port's entry into a lease with Weyerhaeuser, alleging that the activities attendant to the lease would result in greater pollution, increased traffic, and negative effects on wildlife. 2014 Wash. App. LEXIS 1924, *12-13, 2014 WL 3859591 (2014) (unpublished). The Court held that these alleged harms ("e.g., boats may sink; there may be more boat wakes, which disrupt the sand lance habitat and, in turn affect animals further up the food chain, and the new activity may disturb areas that plaintiffs claim are already polluted") were all hypothetical and could not confer standing. *Id.* at *13.

To the extent that OUWL alleges that the project may somehow alter some future available options for remediating alleged preexisting environmental deficiencies, such claims do not fall within the zone of interests SEPA was intended to address. Even if this was a proper consideration, which it is not, OUWL does not allege that siting a project approximately 250' away from a culverted stream segment will make future remediation options impossible, only that it may somehow limit such future unplanned and undetermined activities, or make them more extensive or expensive. *See, e.g.,* OUWL's Appeal Brief at 9, lines 2-9 (noting possible requirement to construct "extensive retaining walls or demolition," and further noting the

[4] OUWL's Appeal Brief at 2, lines 1-8, at 24, line 9.

CASCADIA LAW GROUP PLLC
606 COLUMBIA ST. NW, SUITE 212
OLYMPIA, WA 98501
(360) 786-5057

"economic benefits" that could result from daylighting).[5] OUWL's assertions that the project may somehow limit restoration efforts associated with already degraded water quality, or limit the options for future remediation, does not allege any immediate, concrete, and specific harm occasioned by the project itself, and is purely hypothetical and speculative in nature. An allegation that a project may make a future hypothetical restoration project more difficult does not constitute an adverse environmental impact under SEPA.[6] *See Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 59 (2002).

OUWL has not and cannot meet its burden of establishing standing to challenge the DNS. As such, its SEPA appeal should be dismissed. Further, as Appellant lacks standing, the Examiner lacks jurisdiction to consider this appeal, and should dismiss these claims now to avoid a useless hearing on these issues. *See, e.g., High Tide Seafoods v. State of Washington*, 106 Wn.2d 695, 702 (1986) ("If a plaintiff lacks standing to bring a suit, courts lack jurisdiction to consider it."); *see also Branson v. Port of Seattle*, 152 Wn.2d 862, 875 n.6 (2004) (same). 3rd Gen respectfully requests the Examiner enter an order dismissing OUWL's SEPA claims based on lack of standing.

B. OUWL is Precluded from Appealing the City's DNS Based on its Failure to Comment

OUWL further is precluded from bringing its SEPA claims before the Examiner based on its failure to comment during the City's administrative review. A party that does not comment on a threshold determination during the comment period is precluded from later appealing that same

---

[5] Furthermore, these inherently speculative impacts are not within the zone of interests covered by SEPA. *See Conserv. Nw. v. Okanogan County*, 194 Wn. App. 1034, 2016 Wash. App. LEXIS 1410, *49 (2016) (unpublished) ("SEPA statutes contain language directed to the specific objective of preventing the SEPA process from considering speculative impacts in an effort to prevent SEPA from becoming a tool of the obstructionist."). Further, to the extent such future projects, if ever proposed or approved, could be more expensive, or could result in some economic benefit, purely economic interests are not within the zone of interests protected by SEPA. *See cf. Harris v. Pierce County,* 84 Wn. App. 222, 231 (1996).

[6] As OUWL's briefing itself makes clear, the City has advised that it has no plans to daylight Moxlie Creek, that "City staff does not support nor will [they] advocate for the project," OUWL Appeal Brief at 19, lines 2-5, that the City "do[es] not have a capital facilities project nor funding nor any grant applications pending that would apply to such a project," *id.* at 19, lines 14-16, and that the City "'has not expressed an intent or interest in utilizing Port property for daylighting efforts.'" *Id.* at lines 24-25.

CASCADIA LAW GROUP PLLC
606 COLUMBIA ST. NW, SUITE 212
OLYMPIA, WA 98501
(360) 786-5057

decision. WAC 197-11-545 (Effect of no comment). The City issued its DNS for the project on February 15, 2018 and established a comment deadline of 5:00 pm, March 1, 2018. The DNS provided that "[c]omments regarding the Determination of Non-Significance (DNS) should be directed to the SEPA Official at the address above." *See* OUWL's Notice of Appeal (attaching Notice of Land Use Approval and State Environmental Policy Act Determination of Nonsignificance (SEPA DNS)).[7] OUWL has not cited to any facts demonstrating it provided any SEPA comments in response to the City's issuance of the DNS.

Pursuant to WAC 197-11-545(2), failure to comment on a DNS "shall be construed as lack of objection to the environmental analysis." Accordingly, failure to comment in the SEPA process precludes administrative or judicial challenge on a basis that could have been, but was not communicated through the available SEPA comment process. *See* SETTLE, RICHARD L., THE WASHINGTON STATE POLICY ACT: A LEGAL AND POLICY ANALYSIS at § 20.04[1]. The City's applicable code provisions set forth in chapter 14.14 OMC (Environmental Policy), specifically incorporate by reference this requirement. OMC 14.14.020. In not commenting on the DNS, OUWL's failed to exhaust administrative remedies and waived its right to appeal here, and hence lack standing to contest the environmental review and DNS. Because OUWL did not comment during the formal SEPA comment period, it is precluded from bringing this SEPA appeal now. OUWL's SEPA appeal should be dismissed, in its entirety.

C. 3rd Gen is Entitled to Summary Judgment as to OUWL's SEPA Allegations as a Matter of Law

In the alternative, 3rd Gen moves for summary judgment in its favor, dismissing OUWL's SEPA claims. The City issued its DNS threshold determination February 15, 2018. Pursuant to SEPA, threshold determinations "of the governmental agency shall be accorded substantial weight." RCW 43.21C.090. Here, OUWL asks this Examiner to find that the City's DNS threshold determination was "clearly erroneous" and require preparation of an Environmental

[7] *See also* Rehberger Decl. at Exhibit B.

CASCADIA LAW GROUP PLLC
606 COLUMBIA ST. NW, SUITE 212
OLYMPIA, WA 98501
(360) 786-5057

Impact Statement ("EIS"). *See* Notice of Appeal at 2. In support of its position, OUWL argues that the environmental review was insufficient and "improperly piecemealed." OUWL cannot establish these claims. There is no basis to require an EIS for this project. SEPA requires the preparation of an EIS only for "proposals for legislation and other major actions having a probable significant, adverse environmental impact." RCW 43.21C.030(1); WAC 197-11-330. Here, there is simply no evidence that 3rd Gen's proposal will cause probable significant adverse environmental impact.

SEPA Checklist and Adequate Disclosures. OUWL first alleges that the City's DNS is "clearly erroneous" based on an allegation that it "fail[ed] to take into account the existence of a critical area adjoining the site of the proposed development." OUWL's Appeal Brief at 26, lines 10-12. Yet, later in that same paragraph, OUWL acknowledges, as it must, that the environmental checklist prepared by 3rd Gen, and reviewed and considered by the City, did in fact expressly disclose this fact. *Id.* at 26, lines 23-24. As OUWL concedes, the "environmental checklist notes . . . that the project is 'approximately 250' from Moxlie Creek.'" *Id.* (quoting SEPA Environmental Checklist, Section B.3).[8] Having clearly and fully disclosed this issue in the SEPA environmental checklist, there is simply no basis to assert now that the City's review failed to take this into account.

Cumulative Impacts. OUWL's second claim of improper piecemealing also has no factual support and fails as a matter of law. OUWL appears to base its argument on two issues--one, that 3rd Gen should be required to address existing alleged water quality issues, and two, that the City should have considered potential future development activities not associated with 3rd Gen's project. Both arguments fail.

First, SEPA does not require project applicants to remedy existing environmental conditions not created by the proposed project. As discussed above, lead agencies are asked to consider whether the proposed action itself will have a probable significant environmental impact

[8] *See also* Rehberger Decl. at Exhibit A (SEPA Environmental Checklist).

CASCADIA LAW GROUP PLLC
606 COLUMBIA ST. NW, SUITE 212
OLYMPIA, WA 98501
(360) 786-5057

"in excess of those created by existing uses in the area." *Norway Hill Pres. & Prot. Assn.*, 87 Wn.2d at 277. Washington courts have recognized that "the nature of cumulative impacts is prospective and not retrospective." *Boehm v. City of Vancouver*, 111 Wn. App. 711, 719 (2002).

Second, OUWL's concern is less with 3rd Gen's project and more with some future unknown projects closer to Moxlie Creek. OUWL attempts to frame 3rd Gen's project as part of a larger development "the buildout of which is the first step." OUWL's Appeal Brief at 24, lines 6-7. OUWL claims that "[t]he present proposal is only the first step in a series of land use actions that, collectively, if not individually, exert a probable, significant adverse impact on the degraded water running between the properties and East Bay nearby." *Id.* at 24, line 28, 25 lines, 1-6. OUWL claims that a hypothetical future "restoration of Moxlie Creek delta would require use of land included in the ultimate buildout. . . ." *Id.* at 11, lines 2-4.

OUWL's claims fail as a matter of law. As Washington courts have made clear, "[a] cumulative impact analysis" under SEPA "need occur only when there is some evidence that the project under review will facilitate future action that will result in additional impacts." *Boehm v. City of Vancouver*, 111 Wn. App. 711, 719 (2002). Such a cumulative impact consideration is appropriate only where the project at issue is "dependent on subsequent proposed development." *Id.* at 720. Where a project's cumulative impacts are merely "speculative," they need not be considered. *Id.* at 720. Here, 3rd Gen's proposed project is independent of any future development. There are no other land use applications pending on the intermediary parcels OUWL actually complains of, and 3rd Gen's project is in no way dependent on any subsequent proposed development (in fact no such development is currently being proposed at all). OUWL's claims are entirely speculative and, as such, are precluded from SEPA consideration. While SEPA rules require the consideration of environmental impacts, lead agencies are precluded from consideration of speculative impacts. WAC 197-11-060(4)(a) ("attention to impacts that are

CASCADIA LAW GROUP PLLC
606 COLUMBIA ST. NW, SUITE 212
OLYMPIA, WA 98501
(360) 786-5057

likely, not merely speculative"); *see also* WAC 197-11-782.[9] *Harris v. Pierce County*, 84 Wn. App. 222, 231-232 (1996)).

OUWL has established no basis in law or fact to support a finding that the DNS was "clearly erroneous" or that an EIS must be required. OUWL's SEPA claims should be dismissed.

D. The City's CAO Does Not Impose Buffering Requirements on Culverted Stream Segments

Finally, OUWL alleges that the City's DNS and land use approval "are both clearly erroneous because they fail to take account of the existence of a critical area adjoining the site of the proposed development." OUWL's Appeal Brief at 26, lines 10-12. The City's CAO and buffer requirements apply to "streams and important riparian areas." *Id.* at 26. Moxlie Creek does not meet the Code's definition of an "important riparian areas." OMC 18.32.405(B). While the subject segment of Moxlie Creek flows through the culvert "approximately 250 feet" away from the proposed project and underneath City right-of-way and improved street (Chestnut Street),[10] the City does not apply buffer requirements to culverted streams.

Contrary to OUWL's assertion that the City "failed to take account" of the existence of the stream segment, the presence of the culverted Moxlie Creek was considered by the City. As OUWL itself later acknowledges, the presence of the Moxlie Creek stream segment in the underground culvert was in fact expressly disclosed and considered. *See* OUWL's Appeal Brief at 26, lines 23-24 (quoting Environmental Checklist at Section B.3 (noting that "the project is 'approximately 250' from Moxlie Creek'")).[11] City staff reviewed the submittal and in approving the land use decision, determined that no buffers attached to the piped culvert.[12]

---

[9] "'Probable' means likely or reasonably likely to occur, as in 'a reasonable probability of more than a moderate effect on the quality of the environment'" (see WAC 197-11-794). Probable is used to distinguish likely impacts from those that merely have a possibility of occurring, but are remote or speculative." WAC 197-11-782.

[10] *See* OUWL's Appeal Brief at 26, line 24, and Exhibit 11.

[11] *See also* Rehberger Decl. at Exhibit A (SEPA Environmental Checklist).

[12] Of note, as OUWL's appeal material themselves set forth, the culvert containing Moxlie Creek does not represent any portion of Moxlie Creek occurring in any predevelopment natural state. Rather, as OWUL alleges originally Moxlie Creek "'discharged to East Bay approximately 3,100 feet upstream of the current pipe outlet.'" OUWL's Appeal Brief at 6, lines 2-19 (citation omitted). As is evident from the mapping provided, where the culvert traverses underneath improved City right-of-ways and through the heavily developed downtown core, the City has not and does not apply buffering requirements to this culvert. *See, e.g.*, OUWL's Appeal Brief at Exhibit 18 (attachment showing culvert's "Moxlie Creek, Downtown Piped Route").

CASCADIA LAW GROUP PLLC
606 COLUMBIA ST. NW, SUITE 212
OLYMPIA, WA 98501
(360) 786-5057

Moreover, the City's Critical Areas Ordinance, chapter 18.32 RCW ("CAO") does not require buffers for underground piped culverts. In adopting its CAO, the City recognized the unique nature of underground culverts and extensive pipe system underlying downtown Olympia. As OUWL's appeal materials note, Moxlie Creek is piped beginning under Interstate 5, and then north of Interstate 5 enters an urban area of high-density commercial and industrial land use "and is piped under downtown Olympia to Budd Inlet."[13] Recognizing the unique nature of culverted stream segments, the CAO provides that even if and when such a culverted stream segment is later removed from a culvert (which is not being proposed here) "it will not be required to meet the stream buffer requirements of OMC 18.32.435." OMC 18.32.435(I) (emphasis added). In adopting this provision, the City indicated its clear intent to exempt culverted stream segments from application of OMC 18.32.435. Interpreting the City code to somehow require buffers for underground culverted stream segments, as advanced by OUWL, but not to stream segments after they are removed from a culvert would lead to an illogical and absurd result, inconsistent with the intent of the Code. *See cf. Kilian v. Atkinson*, 147 Wn.2d 16, 21 (2002) (reviewing courts and bodies "must also avoid constructions that yield unlikely, absurd or strained consequences").

The purpose of the buffer requirements set out in Olympia's CAO is to protect open streams. *See cf.* OMC 18.32.400 (stating purpose and intent to "preserve the natural functions of streams" by providing for shade, habitat protection, etc.).[14] These purposes are not furthered by applying buffers to culverted stream segments, which is why they are excepted out. *See also cf. Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 431 (2007) ("requirement to protect does not impose a corresponding requirement to enhance"). The City's determination to not apply any buffering requirements to the Westman Mill project associated with the culverted stream segment (approximately 250 feet away and buried 15 to 20 feet underground) is consistent with its code, and is entitled to deference. *See* OMC 18.75.040(F)

[13] *See* OUWL's Appeal Brief at Exhibit 11 (Indian/Moxlie Creek Comprehensive Drainage Plan at 24 (1993).

[14] As a general matter, "[b]uffers are strips of land contiguous to a watercourse, usually containing indigenous shrubs and trees." *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 430 (2007).

CASCADIA LAW GROUP PLLC
606 COLUMBIA ST. NW, SUITE 212
OLYMPIA, WA 98501
(360) 786-5057

("With regard to decisions of city staff, the Examiner shall accord due deference to the expertise and experience of the staff rendering such decision.").

Because the City's buffering requirements do not apply to underground culverted stream segments, OUWL's appeal of the land use and SEPA determination on that basis should be dismissed, and summary judgment entered in favor or 3rd Gen.

V. JOINDER

3rd Gen further joins in and adopts and incorporates by reference Respondent Port of Olympia's Motion for Partial Summary Judgment, filed April 4, 2018.

VI. CONCLUSION

3rd Gen respectfully moves the Examiner to enter an order dismissing Appellant OUWL's appeal, in its entirety. OUWL has not established and cannot establish an injury-in-fact necessary to confer SEPA standing. Lacking standing, its appeal should be dismissed.[15] In the alternative, even if the Examiner were to look to the substance of its SEPA claims, 3rd Gen is entitled to summary judgment as set forth above. Finally, because the City does not apply buffering requirements to piped and culverted stream segments, no basis exists to go to hearing as to application of those buffers here. While OUWL is free to make policy arguments to the appropriate local governments and decision-makers regarding its desire that the City pursue policies and planning efforts aimed at recreating a pre-development era historic estuary, daylight Moxlie Creek through the City's downtown core, and "assume the identify of 'the Venice of the Northwest,'" those interests are best pursued at a policy and planning level, and not in response to

///

///

[15] 3rd Gen has separately moved to dismiss OUWL's claims to the extent they purport to assert and rely on Tribal treaty rights, based on lack of standing.

CASCADIA LAW GROUP PLLC
606 COLUMBIA ST. NW, SUITE 212
OLYMPIA, WA 98501
(360) 786-5057

a project-specific land use proposal. As set forth above, OUWL's appeal should be dismissed, and 3rd Gen is entitled to summary judgment.

DATED this 4th day of April, 2018.

CASCADIA LAW GROUP PLLC

Joseph A. Rehberger, WSBA No. 35556

Attorneys for Applicant 3rd Gen Investment Group, LLC

CASCADIA LAW GROUP PLLC
606 COLUMBIA ST. NW, SUITE 212
OLYMPIA, WA 98501
(360) 786-5057